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Douglas ak Mindod v Public Prosecutor

B HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KCH-42AC-13/10 OF 2017
STEPHEN CHUNG J
9 MAY 2018

C *Criminal Law — Appeal — Appeal against conviction and sentence — Appellant convicted and sentenced at sessions court — Whether appellant in possession of parang — Whether search warrant needed in recovering shotgun — Whether appellant in possession of shotgun — Whether sentence right and fair to run concurrently — Penal Code s 24 — Arms Act 1960 s 3(1) — Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 6(1)*

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On 21 October 2015, PW2, PW3 and PW4 arranged to meet the appellant at Public Food Court, Desa Wira, Jalan Batu Kawa. When the appellant arrived, PW3 approached and entered the vehicle to talk to him. Within ten minutes, E PW3 came out of the vehicle and shouting that he was attacked. PW2 and PW4 went to help but retreated when they saw the appellant pointing a gun towards them. The appellant left in vehicle and they gave chase and called police for assistance. They then saw the appellant's vehicle in front of the gate of a house at Three Hills Park and waited for the police to arrive. The police F then arrested the appellant and recovered a shotgun and a *parang* at the scene. The appellant was charged under four offences: (a) voluntarily caused hurt under s 24 of the Penal Code ('first amended charge') ; (b) possession of an arm without license under s 3(1) of the Arms Act 1960 ('second amended charge'); (c) possession of an ammunition without license under s 3(1) of the Arms Act G 1960 ('third amended charge'); and (d) possession of an offensive weapon in public place under s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('forth amended charge'). After the trial, the appellant was convicted and sentenced to a five years imprisonment under the first amended charge, three years imprisonment under second amended H charge, three years imprisonment under third amended charge and five years imprisonment under forth amended charge. The four sentences were to run concurrently. The appellant then filed an appeal against the convictions whereas the respondent filed a cross-appeal against the sentences imposed. The appellant contended that there was no warrant issued under s 48 of the Arms I Act 1960 and that the Chief Police Officer did not delegate his power to PW1 or any other police officers to search and seize the shotgun.

Held, dismissing the appellant's appeal and the respondent's cross-appeal; and affirming sentences imposed by the trial judge:

(1) It was not in dispute that the *parang* was recovered from inside the vehicle driven by the appellant. At the material time, the appellant was the only person inside the vehicle using the *parang* to attack the victim. The evidence showed that the appellant voluntarily caused hurt to the victim by using the *parang*. There were no merit and no reason to interfere with the findings of the trial judge who had considered and weighed the evidence adduced. The trial judge was correct to convict the appellant under the first amended charge and the fourth amended charge (see paras 15–16).

(2) There was no necessity to apply for a search warrant as the barrel, body and butt of the shotgun was found and recovered from the ground in front of the house and not inside the vehicle or building (see para 18).

(3) At the material time, there was no one else inside the vehicle who could have thrown the gun out of the vehicle. The evidence irresistibly pointed to the fact that it was the appellant who threw the gun or parts of the gun out of the vehicle. It irresistibly pointed to the fact that at the material time the appellant was in possession of the shotgun. There were no merits in the appeal that the appellant was not in possession of the shotgun and bullet (see paras 21 & 23).

(4) Although there were four charges made against the appellant, the facts and time sequence of all the four offences tantamount to one transaction. The trial judge was correct to order the sentences to run concurrently. An appellate court should be slow to interfere or disturb with a sentence passed by the trial judge unless it is manifestly wrong in the sense of being illegal or being unsuitable to the facts and circumstances of the case (see paras 27–28).

[Bahasa Malaysia summary

Pada 21 Oktober 2015, SP2, SP3 dan SP4 berancang untuk berjumpa dengan perayu di Public Food Court, Desa Wira, Jalan Batu Kawa. Ketika perayu sampai, SP3 bertemu dengan perayu dan memasuki kenderaan perayu untuk bercakap dengan perayu. Sepuluh minit kemudian, SP3 keluar dari kenderaaan perayu dan menjerit dia telah diserang perayu. SP2 dan SP4 kemudiaanya datang untuk membantu tetapi terhalang disebabkan tindakan perayu yang mengacukan pistol ke arah mereka. Perayu kemudian beredar menggunakan kenderaan dan dikejar oleh mereka dan mereka meminta bantuan polis. Kemudian, kenderaan perayu dijumpai di hadapan pagar sebuah rumah di Three Hills Park dan mereka menunggu ketibaan polis di tempat tersebut. Polis kemudiannya tiba dan menangkap perayu dan merampas sebilah parang dan sepucuk pistol shotgun di tempat kejadian. Perayu dikenakan tuduhan di bawah empat pertuduhan: (a) menyebabkan kecederaan secara sukarela di bawah s 24 Kanun Keseksaan ('pertuduhan pertama terpinda'); (b) memiliki senjata tanpa lesen di bawah s 3 Akta Senjata

A Api 1960 ('pertuduhan kedua terpinda'); (c) memiliki peluru tanpa lesen di bawah s 3(1) Akta Senjata Api 1960 ('pertuduhan ketiga terpinda'); dan (d) memiliki senjata berbahaya di tempat awam di bawah s 6(1) Akta Bahan Letupan dan Senjata Berbahaya 1958 ('pertuduhan keempat terpinda'). Selepas perbicaraan selesai, perayu dikenakan sabitan dan dihukum lima tahun
B penjara untuk pertuduhan pertama terpinda, tiga tahun penjara untuk pertuduhan kedua terpinda, tiga tahun oenjara untuk pertuduhan ketiga terpinda dan lima tahun penjara untuk pertuduhan keempat terpinda. Keempat-empat hukuman dijalankan secara serentak. Perayu kemudiaanya memfailkan rayuan terhadap sabitan yang dikenakan dan responden
C memfailkan rayuan balas terhadap hukuman yang dikenakan. Perayu mengatakan bahawa tiada waran diperoleh di bawah s 48 Akta Senjata Api 1960 dan pegawai polis tidak memberi kuasa kepada SP1 atau mana-mana pegawai polis untuk mencari dan merampas pistol *shotgun* milik perayu.

D **Diputuskan**, menolak rayuan perayu dan rayuan balas responden; dan mengesahkan hukuman yang diberi oleh hakim bicara:

(1) Adalah tidak menjadi pertikaian bahawa parang telah dijumpai di dalam kenderaan yang dipandu oleh perayu. Pada masa material, hanya perayu
E dalam kenderaan tersebut yang menggunakan parang untuk menyerang mangsa. Tiada apa-apa merit atau sebab untuk mengubah keputusan yang dibuat oleh hakim bicara yang meneliti dan mengambil kira keterangan yang diberikan di mahkamah. Hakim bicara telah membuat keputusan yang betul dalam mengenakan sabitan kepada perayu untuk
F pertuduhan pertama terpinda dan pertuduhan keempat terpinda (lihat perenggan 15–16).

(2) Waran carian tidak menjadi satu keperluan untuk diperolehi disebabkan pistol *shotgun* dan bahagian pistol yang lain telah dijumpai di kawasan di hadapan rumah dan bukannya di dalam kenderaan atau di dalam
G bangunan (lihat perenggan 18).

(3) Pada setiap masa yang material, tiada sesiapa yang berada di dalam kenderaan yang boleh mencampak keluar pistol daripada kenderaan selain perayu. Keterangan dengan jelas menunjukkan perayu yang
H mencampak keluar pistol dan bahagian pistol dari kenderaan. Adalah tidak disangkal pada masa yang material, pistol tersebut dimiliki dan berada dalam pegangan perayu. Tiada apa-apa merit dalam rayuan perayu yang mengatakan perayu tidak memiliki pistol dan peluru tersebut (lihat perenggan 21 & 23).

I (4) Walaupun tedapat empat pertuduhan yang dibuat terhadap perayu, fakta-fakta dan masa terjadinya keempat-empat kesalahan tersebut berlaku dalam satu transaksi. Hakim bicara membuat keputusan yang betul untuk mengarahkan hukuman yang dikenakan berjalan secara serentak. Mahkamah yang mendengar rayuan sepatutnya tidak

mencampuri atau menganggu hukuman yang telah diputuskan oleh hakim bicara melainkan hukuman yang diberikan tidak mengikut lunas perundangan atau tidak sesuai mengikut fakta dan keadaan semasa kes (lihat perenggan 27–28).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018) paras 45–101.

Legislation referred to

Arms Act 1960 ss 2, 2(1), 3(1), 8(a), 45(1), 47, 48, 53(1)
Corrosive and Explosive Substances and Offensive Weapons Act 1958 ss 2, 6(1)
Evidence Act 1950 ss 32, 57
Penal Code s 324

Steven Beti (Teo Sebom, Tan & Madhi Advocates) for the appellant.
Mohd Fillanny bin Siji (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Stephen Chung J:

[1] There were four amended charges against the appellant as follows:

First amended charge:

> That you, on 21st October 2015 at about 8.30 pm, in the vicinity of Public Food Court eatery at Desa Wira, Jalan Batu Kawa, in the District of Kuching, in the State of Sarawak, had voluntarily caused hurt to Voon Chuang Seng (IC No: 780102-13-5433) by means of an instrument for cutting, to wit, a parang, and you had committed an offence punishable under Section 324 of the Penal Code.

Second amended charge:

> That you, on 21st October 2015 at about 1.15 am, in the vicinity of Public Food Court eatery at Desa Wira, Jalan Batu Kawa, in the District of Kuching, in the State of Sarawak, had in your possession an arm as 'arm' is defined in Section 2 of the Arms Act 1960, to wit, a 12 Bore SBBL shotgun — Stevens Gun No E263586, without an arms licence in that behalf and you had thereby contravened Section 3(1) of the Arms Act 1960 and punishable under Section 8(a) of the Same Act.

Third amended charge:

> That you, on 21st October 2015 at about 1.15 am, in the vicinity of Public Food Court eatery at Desa Wira, Jalan Batu Kawa, in the District of Kuching, in the State

A of Sarawak, had in your possession an ammunition as 'ammunition' is defined in Section 2 of the Arms Act 1960, to wit, a 12 Bore RC 12, Italy Bullet, without an arms license in that behalf and you had thereby contravened Section 3(1) of the Arms Act 1960 and punishable under Section 8(a) of the same Act.

B Fourth amended charge:

That you, on 21st October 2015 at about 8.30 pm, in the vicinity of Public Food Court eatery at Desa Wira, Jalan Batu Kawa, in the District of Kuching, in the State of Sarawak, had in your possession in public place an offensive weapon as 'offensive C weapon' is defined in Section 2 of the Corrosive and Explosive Substantives and Offensive Weapons Act 1958, to wit, a parang, otherwise than with lawful authority or for a lawful purpose and you had thereby committed an offence punishable under Section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958.

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[2] After a trial, the appellant was convicted and sentenced to five years imprisonment under the first amended charge, three years imprisonment under the second amended charge, three years imprisonment under the third amended charge and five years imprisonment under the fourth amended E charge, the four sentences to run concurrently. The appellant appealed against the convictions only. The grounds of appeal are set out in the petition of appeal. There is a cross-appeal by the prosecution against the sentences imposed.

[3] The facts of the case. On 21 October 2015, PW2, PW3 and PW4, F arranged to meet the appellant at Public Food Court, Desa Wira, Jalan Batu Kawa about a Toyota Hilux vehicle registered in his wife's name ('DW3'). When the appellant arrived between 8.30–8.45pm, PW3 approached and entered the vehicle to talk to him. Within ten minutes PW3 came out of the vehicle shouting that he was attacked. PW2 and PW4 went to help but G retreated when they saw the appellant pointing a gun towards them. The appellant left in the vehicle and they gave chase and called the police for assistance. They then saw the appellant's vehicle in front of the gate of a house at Three Hills Park and waited for the police to arrive. The police arrested the appellant and recovered a shotgun and a *parang* at the scene.

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[4] The appellant contended that in the afternoon of 21 October 2015, he went to Kg Emperoh Jambu, Padawan using the Toyota Hilux and met with the Penghulu ('DW2') of the area to make inquiry whether DW2 knew anyone how to repair and service a shotgun with missing butt and lock under the I barrel. DW2 told the appellant he did not know anyone who could repair the shotgun. Later he received a telephone call from a person named 'William' inviting the appellant to meet at Desa Wira Food Court to discuss some business matters. The appellant submitted that he arrived at about 8pm but was approached by PW2, PW3 and PW4 who claimed they were car

repossessors for Public Bank. The appellant submitted he drove away but PW2, PW3 and PW4 chased after him and the police came and instructed him to pull over in front of a house at Three Hills Park where he was arrested by the police.

[5] The appellant submitted that based on exhs P20 (letters of administration) ('LA') and P21 (license of the shotgun) the shotgun belonged to his late father and under the LA he was only the administrator of the estate of his late father and not the owner of the shotgun (see exhs P8, P10, P12) and ammunition (bullet casing) (exh P6). It was submitted that the LA could not be conclusive evidence that the appellant was in possession of the shotgun and ammunition and that the ownership of the shotgun and bullet had not been transferred to the appellant. It was submitted that the appellant could not be in custody or possession of the shotgun and ammunition.

[6] It was submitted that the police admitted they never checked who was the owner of the house and they never asked whether the house owner had knowledge of P10, P12 and P6 found outside the house. It was submitted that P10, P12 and P6 could be thrown there by the house owner or by other people.

[7] The appellant submitted that there was no proof that he had possession or control over the *parang* allegedly used to cause injury to PW3 because there was no witness who had seen the *parang*. It was submitted that the trial judge failed to consider that the vehicle did not belong to him and there was no DNA or fingerprints uplifting done and there was nothing to connect the *parang* to the appellant.

[8] It was submitted that the Chief Police Officer did not delegate his power to PW1, PW7, PW8, PW9 or PW10 under s 2 of the Arms Act 1960 and none of them came within the definition of 'Chief Police Officer'. It was submitted that the police who carried out the search of the vehicle and the appellant were without search warrant as required s 47 of the Act and therefore the search was unlawful.

[9] It was submitted that the trial judge misdirected herself when she admitted the photographs marked as ID13 (1–3), ID15 (1–5), ID17 (1–4) and ID19 (1–5) under s 32 of the Evidence Act 1950 through PW9 who was not the maker of the photographs. It was submitted that the photographs were not admissible.

[10] It was submitted that PW1 gave evidence as an expert but no *gazette* notification under s 57 of the Act was produced in court to show that he was *gazetted* as an expert. The defence submitted that PW1 admitted that he was not an expert on shotgun and the prosecution must be bound by the evidence

of its own witness even though it was not in the prosecution's favour.

[11] It was submitted that there was nothing in the photographs marked ID1(1) and ID19 (1–5) to show that the shotgun was in one piece which was consistent with the defence evidence that the shotgun was under repair and certain components had been dismantled and some missing from the main body of the shotgun. It was submitted the shotgun was not serviceable and could not be used. It was submitted it was in the same condition when the shotgun was first found by the police with the shotgun parts scattered in front of the house at Three Hills Park.

[12] It was submitted that the trail judge failed to consider that PW9 had admitted tampering with the body of the shotgun to retrieve the serial number which was otherwise not clearly visible. The appellant submitted that PW9 had not only tampered with the evidence but there was a break in the chain of evidence as a result.

[13] I have read the appeal record, the grounds of judgment, the submissions and the authorities cited by the parties. I shall deal with the first and fourth amended charges together. Under the first amended charge, the appellant was charged for voluntarily causing hurt to PW3 by means of an instrument for cutting, to wit a *parang*. Under the fourth amended charge, the charge was for possession of an offensive weapon in a public place, to wit a *parang*, otherwise than with lawful authority or for a lawful purpose.

[14] I refer to the evidence. After the appellant arrived at the food court to meet a person 'William', he was approached by PW2, PW3 and PW4. PW3 entered the vehicle to talk to the Appellant. Within ten minutes PW3 came out shouting that he was attacked, meaning by the appellant, because there were only both of them inside the vehicle at that time. PW3 testified that the appellant used a *parang* to attack him after some heated argument about repossessing the vehicle. PW3 identified the *parang* in court (see exh P18). PW2 testified that he saw the injury to the back of the PW3 when PW3 came out of the vehicle. PW4 gave similar evidence. The medical doctor ('PW5'), who treated PW3, testified that PW3 sustained a superficial cut wound measuring 7cm by 0.5cm to his back which was consistent being cut by a sharp weapon such as a knife or a *parang*.

[15] Although the police did not do any DNA or fingerprint examination on the *parang*, it was not in dispute that it was recovered from inside the vehicle driven by the appellant. At the material time the appellant was the only person inside the vehicle when he attacked PW3 with a *parang* inside the vehicle. He used the *parang* to attack PW3. PW3 had testified as such. Clearly he was in possession of the *parang* in the vehicle, which was in front of the food court,

which was in a public place. The *parang* came within the definition of 'offensive weapon' in s 2 of the Corrosive and Explosive Substances and Offensive Weapons Act 1958. The evidence showed that the appellant voluntarily caused hurt to PW3 by using the *parang*.

[16] Reading the appeal record, there were no merits and no reason to interfere with the findings of the trail judge who had considered and weighed the evidence adduced. The trial judge was correct to convict the appellant under the first amended charge and fourth amended charge.

[17] In respect of the second amended charge, the appellant was charged for possession of an arm, to wit a 12 Bore SBBL Stevens shotgun, without an arms license in that behalf and had thereby contravened s 3(1) of the Arms Act 1960. Under the third amended charge, he was charged for possession of a 12 BOR RC 12 Italy bullet, which came within the definition of ammunition in s 2 of the Act, without an arms license in that behalf and had thereby contravened s 3(1) of the Act.

[18] On the issues raised by defence that there was no warrant issued under s 48 of the Arms Act and that the Chief Police officer did not delegate his power to PW1 or any other police officers to search and seize the shotgun, it should be noted that the barrel, body and butt of the shotgun were found and recovered from the ground in front of the house and not inside the vehicle or building. Therefore there was no necessity to apply for a warrant as such. Section 53(1) provides that all arms and ammunition in respect of which there has been any offence against this Act or regulation made thereunder shall be seized by any police officer. There were no merits on these submissions.

[19] Based on the appeal record, after PW3 came out of the vehicle shouting that he was attacked, PW2 and PW4 went to help PW3 but retreated when they saw the appellant pointing a gun towards them. They could not say what type of gun, the brand and whether it was in one piece because it was dark and it happened very fast. After that the appellant drove away and PW2, PW3 and PW4 chased after him in their vehicle and called the police for help.

[20] The evidence showed that the appellant was instructed by the police to stop and he stopped the vehicle in front of the gate of the house at Three Hills Park. It was not in dispute that the police recovered a barrel, body and butt of a shotgun from the ground, near to the vehicle, in front of the gate of the said house. PW2, PW3 and PW4 did not testify that they saw the appellant threw the barrel, body and butt of a gun on the ground in front of the house and there was no evidence led that he did so.

[21] Was he in possession of the gun? Based on evidence, the appellant

pointed a gun at PW2 and PW4 in front of the food court and then left in the vehicle. He did not throw the gun or parts of the gun at the food court. During the chase he did not or was not seen to have thrown the gun or parts of the gun from the vehicle. The barrel, body and butt of the gun were recovered from the ground in front of the house at Three Hills Park. It was quite clear that the gun was inside the vehicle driven by the appellant during the chase. At the material time there was no one else inside the vehicle who could have thrown the gun out of the vehicle. The evidence irresistibly pointed to the fact that it was the appellant who threw the gun or parts of the gun out of the vehicle in front of the said house. It irresistibly pointed to the fact that at the material time the appellant was in possession of the shotgun. Further, under s 45(1) of the Arms Act he was deemed to have been in possession of the shotgun.

[22] The photographs taken of the shotgun showed the different parts of the shotgun and the shotgun in one piece. Although the appellant submitted that the photographs were not admissible, PW3 and PW1 had identified the shotgun in court. PW1 testified that he could assemble and put the body, barrel and butt of the shotgun together. PW1 used a bullet found inside the shotgun to test the serviceability of the shotgun and that it could fire. The bullet casing (exh P6), after the bullet was used to test-fire the shotgun and bullet, confirmed the serviceability of the shotgun and bullet. On evidence, the shotgun and bullet were serviceable. Therefore the said shotgun came within the definition of 'arm' in s 2(1) of the Arms Act 1960.

[23] Reading the appeal record, again there were no merits in the appeal that the appellant was not in possession of the shotgun and bullet. For the reasons given, the appeal is dismissed.

[24] In respect of the cross-appeal against sentence, the prosecution submitted that the sentences imposed were grossly inadequate. Perusing the record of appeal, the trial judge had given her grounds for imposing the respective sentences. The trial judge said that considering the factual matrix of the case and the submissions, she imposed the respective sentences, to run concurrently citing into account the proximity of the offences. She did not impose any whipping because the appellant was over the age of 50 years.

[25] Under s 324 of the Penal Code whoever voluntarily causes hurt shall be punished with imprisonment for a term which may extend to ten years or with fine, or with whipping or with any two of such punishments. The trial judge imposed a sentence of five years imprisonment. Under s 8(a) of the Arms Act, any person who contravenes the provisions of the Act shall on conviction be liable to imprisonment for a term not exceeding seven years or to a fine not exceeding ten thousand ringgit, or to both. The trial judge imposed three years imprisonment under the second and third amended charges. Under s 6(1) of

the Corrosive and Explosive Substances and Offensive Weapons Act, a person on conviction shall be liable to imprisonment for a term of not less than five years and not more than ten years, and to whipping. The trial judge imposed five years imprisonment under the fourth amended charge.

[26] In assessing the length of the custodial sentences, I have taken into consideration public interest, the gravity of the offence, the facts of the case, the penalties prescribed, the presence and absence of mitigating factors and the sentencing trend for similar offences.

[27] Although there were four charges against the appellant, under the first and fourth amended charges, the date, time and place of the offences were on 21 October 2015 at 8.30pm at Public Food Court, Desa Wira, Jalan Batu Kawa. Under the second and third amended charges, the date, time and place were on 21 October 2015 at 1.15am at Public Food Court, Desa Wira, Jalan Batu Kawa. In respect of the time stated at 1.15am it should be the next day ie on 22 October 2015 at 1.15am instead of 21 October 2015. The facts showed that the appellant arrived at the food court at about 8.30pm. After he attacked PW3 with the *parang*, he drove away with PW2, PW3 and PW4 chasing after him. They waited for the police to arrive to arrest the appellant and seized the shotgun, bullet and *parang* outside the house at Three Hills Park. This was at about 1.15am the next day. In view of the facts and time sequence of the offences as per the 4 charges this tantamount to one transaction. The trial judge was correct to order the sentences imposed to run concurrently.

[28] An appellate court should be slow to interfere or disturb with a sentence passed by the trial judge unless it is manifestly wrong in the sense of being illegal or being unsuitable to the facts and circumstances of the case.

[29] Reading the record of appeal, there were no merits in the appeal against the sentences. The cross-appeal is hereby dismissed and the sentences imposed are affirmed.

Appellant's appeal and respondent's cross-appeal dismissed and sentences imposed by trial judge affirmed.

Reported by Mohd Kamarul Anwar